

**IN THE MISSOURI SUPREME COURT**

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<b>IN RE:</b>	)	
	)	
<b>EDWARD LANDER</b>	)	<b>SC95263</b>
	)	
<b>Respondent.</b>	)	

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**RESPONDENT'S BRIEF**

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Respectfully submitted,

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## **JURISDICTIONAL STATEMENT**

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo. 2000.

## **STATEMENT OF FACTS**

The following constitutes either additional facts or a clarification of facts set forth by Informant.

### *The Inekoviches' Checks*

The conduct of Mr. Lander that drew the attention of the O.C.D.C. was not an ethical violation, but an oversight which did no harm to his clients and was remedied immediately.

On April 29, 2014, shortly after receiving two settlement checks for his clients Mr. and Mrs. Inekovich (the "Inekoviches"), Mr. Lander met with the Inekoviches, had them sign the releases for the claims, and issued checks to them for their shares of the settlement. (See Exh. 1, Lander Affidavit). Mr. Lander inadvertently failed to have the Inekoviches execute their endorsements on the settlement checks. (Exh. 1; App. 49). That same day, April 29, 2014, Mr. Lander deposited the two mistakenly unendorsed checks into Mr. Lander's IOLTA account. (App. 48: 4-8; Exh. 1(a)). In the meantime, on May 2, 2014, Mr. Lander withdrew \$1,500 as partial payment of his fee (App. 50; 9-15), not knowing the settlement checks had not been endorsed and would be returned. (Exh. 1; App 49:15-23). The Inekoviches, who were provided checks for their share of the settlement, also deposited their checks on or around May 7, 2014. (Exh. 1(a)). However, because the original settlement checks were returned for lack of endorsements, there were no funds to cover the partial fee of \$1,500 or the Inekoviches' postdated checks. (Exh. 1(a); App. 49:1-9).

As soon as Mr. Lander learned of the oversight, he brought the required documents to the Inekoviches, had them endorsed, took them to the bank and issued new checks to the Inekoviches which were thereafter deposited and paid. (Exh. 1(a); App. 51:1-8). No one was harmed. The mistake was quickly remedied.

It was this mistake that drew the attention of the O.C.D.C. which then investigated Mr. Lander's IOLTA Account. (App. 14.).

*The O.C.D.C. Investigation's Conclusions Regarding the June 2, 2014 Balance*

The O.C.D.C.'s investigation concluded that Mr. Lander's account had \$6,895.31 on June 2, 2014, and that if he would have paid himself his fee from the Inekoviches' case and paid the medical provider, Dr. Brust, as promised in his settlement statement, he would have again overdrafted his account. (Brief, 6). This insinuates that Mr. Lander inappropriately took *client* funds for himself causing a negative balance. However, at no time did Mr. Lander take funds belonging to his clients for his own personal use. (Exh. 1). Instead, he did indeed have sufficient funds to cover his remaining fee and payment to Dr. Brust. (Exh. 1).

A review of Mr. Lander's Trust Account bears this out. Mr. Lander's fee (\$4,534) had already been partially accounted for when he withdrew \$1,500 on May 2, 2014. (Exh. 1; App. 50:9-13). Plus, he made payments to Mr. Rothman, the Inekoviches, All Purpose, and Mercy Hospital. Though Mr. Lander testified that he inadvertently put the wrong colored checks in his printer, those checks served as payments against his fee. (App. 52: 3-4; 89, 90). Thus, he was only due \$2,227.00 for his fee. This amount, plus Dr. Brust's bill for \$4,606 comes to \$6,833.00. As Informant found, Mr. Lander's

account had a balance of \$6,895.81 on June 2, 2014 (App. 5:19-25; Exh. 1(a)), a sufficient amount for the payment of Mr. Lander's fee and payment to Dr. Brust. As indicated by the Affidavit of Dr. Brust, he has been paid in full by Mr. Lander. Again, no harm to any client and clearly no indication that Mr. Lander received any funds belonging to any client.

### *Violations*

Mr. Lander admits that he was in violation of Rule 4-1.15(a) for mistakenly writing personal checks from his Trust Account; and he was in violation of Rule 4-1.15(f) for failing to maintain complete records of his Trust Account. However, Mr. Lander, as was found by the Panel, was not engaged in dishonest or fraudulent conduct. (App. 162).

### *Lack of Cooperation*

Mr. Lander apologizes now and did so then and again at the hearing for failing to appear at the two depositions scheduled in his case. Unfortunately, Mr. Lander's wife, Marlene, suffers from Alzheimer's. The stress has taken its toll on Mr. Lander. She has required Mr. Lander's full time attention and caretaking until recently. At the time of the O.C.D.C. investigation, Mr. Lander was pre-occupied with his wife's care. Recognizing the toll it was taking on Mr. Lander, he has since hired a full time caretaker. (See Exh. 1).

### *History of Ethics Violations*

When Mr. Lander learned of the date and time for each of the depositions, he arranged for a caretaker to care for his wife so he could attend. (Exh. 1; App. 57). The

two depositions were missed due to the failure of the caretakers to arrive at his home.  
(See Exh. 1; App. 57:10-17).

Other than the three most recent O.C.D.C. contacts regarding his Trust Account, Mr. Lander has had no other incidences of Rules violations in his 54 years of practice.  
(Exh. 1).



**POINTS RELIED ON**

**I. THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUPPORT THIS COURT'S IMPOSITION OF PROBATION WITH SUPERVISION REGARDING MR. LANDER'S MANAGEMENT OF HIS TRUST ACCOUNT BECAUSE, THOUGH HE VIOLATED RULES OF ETHICS, HIS CONDUCT WAS AT MOST NEGLIGENT; RESULTED IN NO INJURY TO HIS CLIENTS, SHOWED NO DISHONEST MOTIVES, WAS NOT INTENTIONAL AND IN HIS 54 YEARS OF PRACTICE HE HAS NOT BEEN IN VIOLATION OF ANY ETHICS RULES.**

*In re Farris*, 2015 WL 5240375 (Mo. banc 2015)

*In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009)

*In re Crews*, 159 S.W.3d at 360 (Mo. banc 2005)

The ABA Standards for Imposing Lawyer Sanction (1992)

## ARGUMENT

**I. THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUPPORT THIS COURT'S IMPOSITION OF PROBATION WITH SUPERVISION REGARDING MR. LANDER'S MANAGEMENT OF HIS TRUST ACCOUNT BECAUSE, THOUGH HE VIOLATED RULES OF ETHICS, HIS CONDUCT WAS AT MOST NEGLIGENT; RESULTED IN NO INJURY TO HIS CLIENTS, SHOWED NO DISHONEST MOTIVES, WAS NOT INTENTIONAL AND IN HIS 54 YEARS OF PRACTICE HE HAS NOT BEEN IN VIOLATION OF ANY ETHICS RULES.**

Informant relies exclusively on *In re Farris*, 2015 WL 5240375 (Mo. banc 2015) for its argument urging that this Court suspend Mr. Lander's license indefinitely. Application of *Farris* is totally inexplicable. Despite acknowledging that *Farris*, unlike this matter, included Mr. Farris's intent to deceive both his clients and the O.C.D.C., Informant stretches to find similarities to an egregious case where this Court properly issued disbarment as the appropriate discipline.

Mr. Farris lied repeatedly to his clients and the O.C.D.C., stole from his trust account and his clients, and by the time of his hearing, he still had made no effort to remedy his wrongs. Mr. Farris kept the sum of \$66,360 and falsely claimed that his wife paid that amount to his client's medical provider. He did the same with another client. Respondent finds absolutely no similarities with Mr. Lander's case herein.

Though still not comparable, a case that is significantly more similar than *Farris* is *In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009). Mr. Coleman had three prior O.C.D.C. contacts, receiving an admonishment and two reprimands. Unlike this case, Mr. Coleman's conduct inflicted serious harm to his client. He pursued a settlement that his client expressly rejected, then filed a Motion to Enforce that Settlement against his own client, in order to force her to accept the unwanted settlement. He failed in his motion, so he filed a Motion to Withdraw without providing his client with notice of the motion. Mr. Coleman failed to keep records or ledgers of his trust account, commingled funds in his trust account and used his trust account for his own personal use. Yet, this court granted probation to Mr. Coleman.

Mr. Lander's conduct does not reach the severity of misconduct engaged in by Mr. Coleman. Mr. Lander did not violate his client's trust in pursuit of their case. He caused no harm to his clients in any direct manner as was the case for Mr. Coleman. Mr. Lander was guilty of incomplete record keeping and mistakenly using his Trust Account checks to pay his own bills. The overdrafting of his Trust Account was due to an oversight and was quickly remedied. As with Mr. Coleman, Mr. Lander had three recent contacts with the O.C.D.C. related to mistakes he made in his Trust Account. Similar to Mr. Coleman, he received two warnings and an admonishment. Mr. Lander's conduct was not deceitful, not overreaching, not meant to do harm for his own selfish needs – and did no harm to any of his clients – unlike Mr. Coleman. This Court agreed that Mr. Coleman's misconduct “can be remedied by education and supervision.” The same should be said of Mr. Lander.

Informant bases its recommendation for indefinite suspension on its conclusion that Mr. Lander engendered harm to the Inekoviches because he used the settlement funds for his own personal purposes. (Brief, 14). They point to the failure to pay Dr. Brust in support of their argument for aggravating circumstances warranting suspension.

However, there is not one scintilla of evidence to support the allegation that Mr. Lander used Dr. Brust's funds for his own personal purpose. No funds were paid by Mr. Lander out of his client's funds. Plus, as seen by Dr. Brust's Affidavit, Mr. Lander and Dr. Brust have had a long standing working relationship. At no time did Mr. Lander fail to properly and promptly pay Dr. Brust his medical bill from a settlement. Informant's basis for aggravating circumstances is simply not correct. Had Mr. Lander used Dr. Brust's funds for personal use, the undersigned would agree that suspension was warranted. It just was not the case.

Mr. Lander's conduct during the investigation on its face appeared non-cooperative. Mr. Lander is sincerely apologetic about his failure to appear at the two depositions. He acknowledged his wrongdoing and expressed gratitude for the work done by the O.C.D.C. (App. 96-98). He was going through a rough time with the sudden illness of his wife and pre-occupied with her care. Mr. Lander attempted to get help so he could attend, but the caretaker failed to show both times. He explained this to Informant's attorney and apologized for the inconvenience. This serves as a mitigating factor that hopefully this Court will consider and demonstrates that probation with suspension and conditions would be appropriate. Mr. Lander did not in this case nor in the past 54 years has he ever done harm to a client. Furthermore, Mr. Lander indicated

that he learned his lesson about reading the Rules and keeping more careful record keeping.

As stated by Informant, “the fundamental purpose of an attorney disciplinary proceeding is to protect the public and maintain the integrity of the legal profession,” *In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009) quoting *In re Crews*, 159 S.W.3d at 360 (Mo. banc 2005). But “The ABA Standards for Imposing Lawyer Sanction (1992) suggest that probation is the appropriate punishment when the conduct can be corrected and the attorney’s right to practice law needs to be monitored or limited rather than revoked.” *In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009).

Mr. Lander has practiced law for 54 years without doing harm to the public or to the profession. He may be a sloppy record keeper, but he understands the principles of ethics and his fiduciary and ethical duty to his clients. His issues are fixable and if he were to receive probation, with adequate supervision, it is not only unlikely, but his track record shows that it would be improbable that he would do harm to the public or the profession.

## **CONCLUSION**

Mr. Lander's mistakes are fixable, have not caused injury to his clients and were immediately remedied. Dr. Brust was paid, the Inekoviches were paid and Mr. Lander has learned the lesson of keeping proper records, not paying personal expenses from his Trust Account and improving his efforts to respond to complaints from the O.C.D.C. Mr. Lander, at 78 years old and 54 years as a practicing attorney with no ethics violations that have ever done harm to a client, deserves an opportunity, with probation and supervision, to show that he can manage his Trust Account and finish out his career as a productive member of the Bar.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I have on this 6<sup>th</sup> day of January, 2016, served a true and correct copy of the foregoing via the Missouri Electronic Filing System upon the following counsel of record:

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/s/ Ira M. Berkowitz

**CERTIFICATE OF COMPLIANCE WITH RULE 84.06**

The Undersigned hereby certifies that this Appellant's Brief was prepared in the format of Microsoft Word using Times New Roman typeface in font size 13. This Brief contains approximately 2,067 words.

/s/ Ira M. Berkowitz  
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